IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
ASSIGNED ON BRIEFS JUNE 12, 2008

# JAMES R. GULLEY v. TENNESSEE DEPARTMENT OF CORRECTIONS

**Direct Appeal from the Chancery Court for Davidson County**
**No. 07-1474-IV Richard H. Dinkins, Chancellor**

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**No. M2007-02312-COA-R3-CV - Filed September 30, 2008**

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In this appeal, we are asked to determine whether the chancery court properly granted Appellee's Motion for Summary Judgment. The chancery court granted Appellee's Motion for Summary Judgment finding that Appellee did not alter the Judgment of the trial court, when it imposed a consecutive sentence in Hamblen County case 03CR318, as the sentence in case 03CR318 was specifically ordered to be served consecutively to the sentence in Jefferson County case 7087. On appeal, Appellant contends that Appellee altered the trial court's Judgment, as the Judgment orders the sentence in case 03CR318 to be served concurrently with the sentences in Hamblen County cases 03CR231, 03CR319, and 04CR068. Appellant claims Appellee's imposition of a consecutive sentence constituted an unauthorized alteration which violated Appellant's state and federal guarantees against double jeopardy. We affirm.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed**

ALAN E. HIGHERS, P.J.,W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

James R. Gulley, Only, TN, *pro se*

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Kellen A. Baker, Assistant Attorney General, Nashville, TN, for Appellee

## OPINION

### I. FACTS & PROCEDURAL HISTORY

James R. Gulley ("Appellant") is an inmate in the custody of the Tennessee Department of Correction ("Appellee"). On October 15, 2001, Appellant pled guilty to aggravated robbery in Jefferson County case number 7087 and received a suspended sentence of five years. Appellant violated probation and an Order was entered on April 1, 2002, ordering Appellant to serve 180 days in jail and then return to supervised probation.

On March 19, 2004, Appellant pled guilty in Hamblen County Criminal Court in four cases: 03CR231, 03CR318, 03CR319, and 04CR068. Appellant was sentenced to two years and one day in case 03CR318 to be served consecutively to Jefferson County case 7087 and concurrently with Hamblen County cases 03CR231, 03CR319, and 04CR068. Appellant was sentenced to two years and one day in cases 03CR231 and 03CR319 and one year in case 04CR068. Cases 03CR231, 03CR319, and 04CR068 were ordered to run concurrently with all Hamblen County cases.

Appellant violated his probation, again, and on May 6, 2004, the Jefferson County Circuit Court entered an Order revoking Appellant's probation, requiring him to serve the balance of his sentence.

Appellant submitted to Appellee a Petition for Declaratory Order, dated May 31, 2007, which was denied. On June 29, 2007, Appellant filed a Petition for Declaratory Judgment in the Davidson County Chancery Court against Appellee and the Commissioner of the Tennessee Department of Correction alleging that Appellee altered the trial court's Judgment in case 03CR318 by applying the sentence in case 03CR318 consecutively to case 7087, rather than concurrently with the other Hamblen County sentences. Appellee filed a Motion for Summary Judgment on August 27, 2007, citing the affidavit of Candace Whisman, Director of Sentence Management Services, Tennessee Department of Correction, and the Judgment in case 03CR318 showing that case 03CR318 was ordered to be served consecutively to Jefferson County case 7087. On September 27, 2007, the trial court granted Appellee's Motion for Summary Judgment and dismissed Appellant's Petition for Declaratory Judgment, from which this appeal followed .

### II. ISSUE PRESENTED

Appellant has timely filed his notice of appeal and presents the following issue for review, summarized as follows:

1. Whether the trial court erred when it granted Appellee's Motion for Summary Judgment finding that Appellee did not alter the Judgment of the Hamblen County Criminal Court when it ran case 03CR318 consecutively, rather than concurrently, to Jefferson County case 7087.

For the following reasons, we affirm the decision of the chancery court.

## III. STANDARD OF REVIEW

In ***Teter v. Republic Parking System, Inc.,*** 181 S.W.3d 330, 337 (Tenn. 2005), our Supreme Court restated the applicable standard of review when appellate courts review a motion for summary judgment. The court stated:

> The purpose of summary judgment is to resolve controlling issues of law rather than to find facts or resolve disputed issues of fact. ***Bellamy v. Fed. Express Corp.,*** 749 S.W.2d 31, 33 (Tenn. 1988). Summary judgment is appropriate only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. ***See*** **Tenn. R. Civ. P. 56.04;** ***Penley v. Honda Motor Co.,*** 31 S.W.3d 181, 183 (Tenn. 2000); ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993). In reviewing the record, the appellate court must view all the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. ***Staples v. CBL & Assocs., Inc.***, 15 S.W.3d 83, 89 (Tenn. 2000). And because this inquiry involves a question of law only, the standard of review is de novo with no presumption of correctness attached to the trial court's conclusions. ***See Mooney v. Sneed***, 30 S.W.3d 304, 306 (Tenn. 2000); ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995).

***Id.***

In this case, Appellee bears the burden of proving that no genuine and material issues of fact exist, such that Appellee is entitled to a judgment as a matter of law. ***See Byrd*****,** 847 S.W.2d at 211. Appellee contends summary judgment was appropriately granted in its favor as Appellee did not alter Appellant's sentence, as evidenced by the affidavit of Candace Whisman and the Judgment in case 03CR318.

## IV. DISCUSSION

On appeal, Appellant asserts that the chancery court erred when it granted Appellee's Motion for Summary Judgment. Specifically, Appellant argues that the Judgment in Hamblen County case 03CR318 directs Appellant's sentence in that case to be served concurrently with Hamblen County cases 03CR231, 03CR319, and 04CR068. Appellant contends that by running case 03CR318 consecutively to Jefferson County case 7087, Appellee has altered the Hamblen County Judgment in case 03CR318, without authority to do so, thereby violating Appellant's federal and state constitutional guarantees against double jeopardy. We address this contention below.

Tennessee Rule of Criminal Procedure 32(c)(1) addresses multiple sentences stemming from a single trial, and provides:

> If the defendant pleads guilty or is convicted in one trial of more than one offense, the trial judge shall determine whether the sentences will be served concurrently or consecutively. The order shall specify the reasons for this decision and is reviewable upon appeal. *Unless it affirmatively appears that the sentences are consecutive, they are deemed to be concurrent*.

**Tenn. R. Crim. P. 32(c)(1)** (emphasis added). The rule provides further guidance when the defendant is subject to a prior sentence imposed by a Tennessee court that has not been fully served. The rule states:

> If the defendant has additional sentences not yet fully served as the result of convictions in the same court or in other courts of Tennessee and if this fact is made known to the court prior to sentencing, the court shall recite this fact in the judgment setting sentence, and the sentence imposed is deemed to be concurrent with the prior sentence or sentences, *unless it affirmatively appears that the new sentence being imposed is to be served consecutively to the prior sentence or sentences*.

***Id.* at (c)(2)(A)(i)** (emphasis added). Concerning a trial court's authority to impose consecutive sentences, Tennessee Code Annotated section 40-35-310 provides:

> [I]n any case of revocation of suspension on account of conduct by the defendant which has resulted in a judgment of conviction against the defendant during the defendant's period of probation, the trial judge may order that the term of imprisonment imposed by the original judgment be served *consecutively* to any sentence which was imposed upon such conviction.

**Tenn. Code Ann. § 40-35-310 (2006)** (emphasis added). Likewise, Tennessee Code Annotated section 40-35-115 states:

> The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that: (6) The defendant is sentenced for an offense committed while on probation[.]

**Tenn. Code Ann. § 40-35-115 (2006).**

Thus, under Tennessee law, a trial court has authority to impose consecutive sentences upon a defendant who receives separate sentences in a single trial or who receives a conviction for

criminal activity that occurred while the defendant was on probation for another crime. ***See*** **Tenn. Code Ann. §§ 40-35-115, -310; Tenn. R. Crim. P. 32(c)(1), (c)(2)(A)(i).** However, to impose consecutive sentences, the trial court must make such an intention clear. ***See*** **Tenn. R. Crim. P. 32(c)(1), (c)(2)(A)(i).**

Appellant is correct in his assertion that "[t]he Tennessee Department of Correction may not alter the judgment of a court." ***State v. Burkhart***, 566 S.W.2d 871, 873 (Tenn. 1978). However, we find that Appellee did not alter the trial court's judgment. In the instant case, the Judgment of the Hamblen County Criminal Court states that case 03CR318 shall be served "[c]oncurrent with: Hamblen Co. case #'s [sic] 03CR231, 03CR319, 04CR068." However, as Appellant has failed to acknowledge, it also states that case 03CR318 shall be served "[c]onsecutive to: Jefferson County Circuit Court case #7087 for an effective 7 year sentence." The trial court's Judgment affirmatively ordered that case 03CR318 be served consecutively to Jefferson County Circuit Court case 7087. We find the trial court met its burden of "affirmatively" showing its intention to run cases 03CR318 and 0708 consecutively. As such, Appellee did not increase, modify, or alter the trial court's judgment, but only carried out the sentence imposed by the trial court.

Furthermore, Appellant's reliance on ***Tinker v. State***, 579 S.W.2d 905 (Tenn. Crim. App. 1979), contending that Appellee's alteration violates double jeopardy, is misplaced. ***Tinker*** relied on the United States Supreme Court's decision in ***Ex parte Lange***, 85 U.S. (18 Wall) 163 (1874) in holding that once a defendant has begun serving his sentence, that sentence may not be increased. ***State v. Jones***, 15 S.W.3d 880, 896 (Tenn. Crim. App. 1999). In ***Lange***, the United States Supreme Court reasoned:

> If, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction [against double jeopardy] of any value? . . . [W]e do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it.

85 U.S. at 173. However, after ***Tinker***, the United States Supreme Court acknowledged that ***Lange*** had been misinterpreted. ***Jones***, 15 S.W.3d at 897 (citing ***U.S. v. DiFrancesco***, 449 U.S. 117, 133-39 (1980)). The Court limited ***Lange*** as applying only where the defendant had satisfied one of two

alternative punishments.[1] ***Id.*** The Court further stated that the history of sentencing practices in state and federal courts did not support a finding that sentences should be afforded a constitutional finality equal to acquittals. ***Id.*** (citing ***DiFrancesco***, 449 U.S. at 127-32). Thus, our Court of Criminal Appeals, in ***Jones***, declined to apply ***Tinker***, holding that it is no longer persuasive law. ***Id.***

## V. CONCLUSION

For the aforementioned reasons, we affirm the chancery court's grant of summary judgment in favor of Appellee. Costs of this Appeal are to be taxed to Appellant, James R. Gulley, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.

[1] Lange was convicted of an offense for which the punishment was either confinement or a fine, but not both. ***Tinker,*** 579 S.W.2d at 906 (citing ***Lange***, 85 U.S. at 164). Lange, however, was sentenced to confinement for one year and a $200.00 fine. ***Id.*** When Lange paid the fine after five days incarceration, the trial court immediately resentenced him to confinement for one year and no fine. ***Id.***